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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 11, 2022

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELTON HERNANDEZ CASTRO; and
KRISTINE NICHOLLE HERNANDEZ,
Plaintiffs,

v.
ALEJANDRO MAYORKAS, United
States Secretary of the Department of
Homeland Security; ANTHONY J.
BLINKEN, United States Secretary of
State; and ERIC S. COHAN, Consul
General of the United States, City of
Ciudad Juarez,
Defendants.

No. 2:21-CV-00315-SAB

**ORDER DENYING
DEFENDANTS' MOTION TO
DISMISS**

Before the Court is Defendants' Motion to Dismiss the Amended Complaint, ECF No. 6. Plaintiffs are represented by Clayton Cook-Mowery. Defendants are represented by Elissa Fudim. The motion was considered without oral argument. Having considered the briefing and the applicable caselaw, the Court denies Defendants' motion.

Background

U.S. citizens and lawful permanent residents of the United States can petition for an immigrant visa for their immediate noncitizen relative by engaging in a two-step process. First, the U.S. citizen or lawful permanent resident must file

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1 a petition with U.S. Citizenship and Immigration Services (“USCIS”) known as a
 2 Form I-130 (Petition for Alien Relative). *See* 8 U.S.C. § 1154(a)(1); 8 C.F.R.
 3 § 204.2. Second, if the petition is approved, the noncitizen can apply to the State
 4 Department for a visa. *See* 8 U.S.C. §§ 1201(a), 1202(a). As part of the visa
 5 application process, the noncitizen must appear for an in-person interview at a U.S.
 6 consulate abroad. 22 C.F.R. §§ 42.61-62.

7 However, if the noncitizen applying for the visa has been unlawfully present
 8 in the United States for more than one year, the noncitizen must submit a Form I-
 9 601A, Application for Provisional Unlawful Presence Waiver, prior to departing
 10 the United States for their consulate interview. Otherwise, if the noncitizen departs
 11 the United States without receiving this waiver, they become inadmissible to the
 12 United States and are ineligible for a visa for ten years from their date of departure.
 13 8 U.S.C. § 11282(a)(9)(B); *but see also* 8 C.F.R. § 212.7(e) (“A pending or
 14 approved provisional unlawful presence waiver does not constitute a grant of a
 15 lawful immigration status or a period of stay authorized by the Secretary.”).

16 The decision whether to grant or deny a visa application rests with the
 17 consular officer. *See* 8 U.S.C. § 1201(a)(1). If the consular officer finds that the
 18 noncitizen is ineligible for a visa, the officer must deny the visa. 8 U.S.C.
 19 § 1201(g). Moreover, if the consular officer finds that the noncitizen is ineligible
 20 based on a ground of inadmissibility other than unlawful presence in the United
 21 States, the noncitizen’s provisional unlawful presence waiver is automatically
 22 revoked. 8 C.F.R. § 212.7(e)(14)(i). In order to request reconsideration of a visa
 23 denial, the noncitizen must (1) remain outside of the United States; (2) reapply for
 24 a new provisional unlawful presence waiver; and (3) after obtaining this waiver,
 25 request reconsideration of their visa application. *See id.*; 22 C.F.R. § 42.81(e).
 26 Upon denial of a visa application, if the noncitizen (1) requests reconsideration
 27 within one year of the denial and (2) provides evidence that overcomes the ground
 28

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1 of ineligibility on which the denial was based, the consulate officer must
 2 reconsider the denial. 22 C.F.R. § 42.81(b), (e).

3 As part of the visa application process, the noncitizen must submit to a
 4 physical and mental examination. 8 U.S.C. § 1201(d). If the medical examination
 5 is performed abroad, the examination is conducted by a panel physician selected by
 6 the U.S. Department of State embassies and consulates.¹ After the examination, the
 7 panel physician will complete certain forms, which they then submit to the
 8 consular office. A noncitizen can be found ineligible for a visa if they do not meet
 9 certain medical eligibility requirements, including if the noncitizen has not
 10 received the vaccinations recommended by the Advisory Committee for
 11 Immunization Practices. 8 U.S.C. § 1182(a)(1)(A)(ii) (“Any [noncitizen] . . . who
 12 has failed to present documentation of having received vaccination against
 13 vaccine-preventable diseases, which shall include . . . any [] vaccinations against
 14 vaccine-preventable diseases recommend by the Advisory Committee for
 15 Immunization Practices . . . is inadmissible.”).

16 **Facts and Procedural History**

17 The following facts are drawn from Plaintiffs’ First Amended Complaint,
 18 ECF No. 5.

19 Plaintiffs Elton Hernandez Castro (“Mr. Hernandez Castro”) and Kristine
 20 Nicholle Hernandez (“Ms. Hernandez”) are a married couple. Ms. Hernandez is a
 21 U.S. citizen, whereas Mr. Hernandez Castro is not.

22 On July 30, 2018, Mrs. Hernandez filed a Form I-130 Family Petition on
 23 behalf of Mr. Hernandez Castro, which was approved on March 22, 2019. On
 24 November 14, 2019, Mr. Hernandez Castro then applied for a Form I-601A
 25

26¹ U.S. Centers for Disease Control and Prevention, *Medical Examination:*
 27 *Frequently Asked Questions (FAQs)* (Oct. 4, 2021),
 28 <https://www.cdc.gov/immigrantrefugeehealth/about/medical-exam-FAQs.html>.

1 (Application for Provisional Unlawful Presence Waiver), which was approved on
2 April 30, 2021. Finally, on September 27, 2021, Mr. Hernandez Castro was
3 informed that his consular interview for an immigrant visa had been scheduled for
4 October 7, 2021 in Mexico. Mr. Hernandez Castro was also informed that, as part
5 of his visa application, he was required to undergo a medical examination on
6 October 5, 2021, also in Mexico.

7 On October 1, 2021, the Advisory Committee for Immunization Practices
8 added the COVID-19 vaccination to its recommendations for all immigrant visa
9 applicants. However, agency regulations also set out circumstances under which
10 blanket waivers of this vaccination requirement were appropriate, including if the
11 panel physician performing the medical examination determined that the vaccine
12 was “not routinely available” and was not expected to be available within four
13 months following the examination date.

14 Here, when Mr. Hernandez Castro appeared for his medical examination on
15 October 5, 2021, he was not vaccinated for COVID-19. However, Mr. Hernandez
16 Castro alleges that the panel physician performing his medical examination failed
17 to consider whether the COVID-19 vaccine was routinely available in Mexico. In
18 fact, Mr. Hernandez Castro alleges that the physician told him that this
19 determination was one that would be made by the consulate, rather than by the
20 physician.

21 When Mr. Hernandez Castro attended his consulate interview on October 7,
22 2021, he was told that his immigration visa was denied on two grounds: (1)
23 because he had not received the COVID-19 vaccine, as required by the CDC; and
24 (2) because he had been found to be inadmissible for having been unlawfully
25 present in the United States. Additionally, because Mr. Hernandez Castro was
26 found to be inadmissible on a basis other than unlawful presence, the consulate
27 revoked his previously-approved Form I-601A (Application for Provisional
28 Unlawful Presence Waiver).

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1 After his visa denial, Mr. Hernandez Castro obtained the COVID-19
2 vaccination. He states that he is now fully vaccinated and has provided this proof
3 of vaccination to both the panel physician and the consulate in Mexico. However,
4 Plaintiffs state that Defendants have not reconsidered Mr. Hernandez Castro's
5 initial visa denial.

Plaintiffs filed their Complaint on November 3, 2021. ECF No. 1. Plaintiffs then filed an Amended Complaint on January 11, 2022, with the consent of Defendants' counsel. ECF No. 5. In the First Amended Complaint, Plaintiffs alleged claims for declaratory and injunctive relief under the Due Process Clause of the Fifth Amendment to the U.S. Constitution and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559. Specifically, Plaintiffs alleged that Defendants violated due process and the APA when the panel physician failed to consider whether the vaccine was routinely available, which led to the denial of Mr. Hernandez Castro's visa application. Plaintiffs also pled a mandamus claim and requested an order (1) requiring Defendants to reconsider their initial visa denial; and (2) if, upon reconsideration, Mr. Hernandez Castro was no longer found to be inadmissible on any other ground, requiring Defendants to reinstate his Form I-601A waiver.

19 Defendants filed the present Motion to Dismiss on January 25, 2022. ECF
20 No. 6. The Court has not yet set a trial date in this matter.

Legal Standard

22 Federal Rule of Civil Procedure 12(b)(1) allows a defendant to move for
23 dismissal if the plaintiff's complaint fails to sufficiently allege federal subject
24 matter jurisdiction. However, "jurisdictional dismissals in cases premised on
25 federal-question jurisdiction are exceptional" and are permitted only when the
26 claim is "patently without merit." *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th
27 Cir. 1987).

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When the jurisdictional question is intertwined with the merits of the case, the matter is treated nearly like a Rule 12(b)(6) motion. A jurisdictional determination is intertwined with the merits of a case when a statute provides the basis for both subject-matter jurisdiction and the plaintiff's substantive claim for relief. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-40 (9th Cir. 2004).

Rule 12(b)(6) allows a party to move for dismissal if the plaintiff has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal under this rule is only proper if there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). When considering a 12(b)(6) motion, the court accepts the allegations in the complaint as true and construes the pleading in the light most favorable to the party opposing the motion. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). However, this does not require the Court "to accept as true legal conclusions couched as factual allegations." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1221 (9th Cir. 2020).

To survive a motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Levit v. Yelp!, Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (requirements of notice pleading are met if plaintiff makes a short and plain statement of their claims). A claim is plausible on its face when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The allegations must be enough to raise the right to relief above a speculative level. *Twombly*, 550 U.S. at 555.

Discussion

Defendants request that the Court dismiss Plaintiffs' First Amended Complaint. Specifically, Defendants argue that (1) the Court lacks jurisdiction over

1 Plaintiffs' APA claim because Plaintiffs have not plausibly alleged that the panel
2 physician was an agent of Defendants and/or that his failure to consider vaccine
3 availability constituted final agency action; (2) Plaintiffs' APA claim is non-
4 justiciable under both the Immigration and Naturalization Act's ("INA") statutory
5 scheme and the doctrine of consular nonreviewability; (3) Ms. Hernandez has
6 failed to state a procedural due process claim both because the Government
7 provided a facially legitimate and bona fide reason for denying her husband's visa
8 and because of the doctrine of consular non-reviewability; (4) Ms. Hernandez has
9 failed to state a substantive due process claim because there is no liberty interest
10 protecting family unity or her right to have her noncitizen husband reside
11 unlawfully with her; and (5) Plaintiffs have failed to state a claim for mandamus
12 because they have not identified a non-discretionary, ministerial act which is
13 indisputably owed to them.

14 Plaintiffs in response concede that (1) their substantive due process claim
15 and (2) their claims insofar as they ask the Court to review the denial of Mr.
16 Hernandez Castro's visa fail to state a claim and thus should be dismissed.
17 However, Plaintiffs argue that they have plausibly alleged APA, procedural due
18 process, and mandamus claims based on the panel physician's failure to consider
19 whether the vaccine was routinely available. Plaintiffs further argue that the Court
20 has jurisdiction over these claims and that they are appropriate for judicial review.
21 Finally, Plaintiffs argue that they have pled sufficient facts to create genuine
22 disputes of material fact, which precludes the Court's ability to resolve this case at
23 the motion to dismiss stage.

24 Defendants in reply argue that Plaintiffs are essentially trying to evade the
25 doctrine of consular nonreviewability by framing their APA and procedural due
26 process claims as a challenge to Defendants' processes, rather than to their ultimate
27 decision to deny Mr. Hernandez Castro's visa. However, Defendants state that,
28 under Ninth Circuit precedent, this kind of challenge is still precluded under the

1 doctrine. Additionally, Defendants reiterate that Plaintiffs' mandamus claim fails
 2 because (1) Plaintiffs have not met the standard for mandamus relief; and (2) even
 3 if they did meet the standard, they still would not be entitled to the relief they seek
 4 because, under agency regulations, the only avenue through which a noncitizen can
 5 seek reinstatement of their Form I-601A waiver is through reapplication.

6 1. Plaintiffs' APA claim

7 Plaintiffs argue that Defendants violated the APA because the panel
 8 physician failed to consider whether the COVID-19 vaccine was routinely
 9 available for Mr. Hernandez Castro and thus whether a blanket waiver would be
 10 appropriate. Defendants argue that Plaintiffs' APA claim fails for multiple reasons,
 11 specifically that (1) the Court lacks jurisdiction over the claim because there was
 12 no final agency action; and (2) even if the Court did have jurisdiction, the Court is
 13 precluded from judicial review based both on the INA's statutory scheme and the
 14 doctrine of consular nonreviewability.

15 Federal administrative agencies are required to engage in "reasoned
 16 decisionmaking." *Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015). "Not only must
 17 an agency's decreed result be within the scope of its lawful authority, but the
 18 process by which it reaches that result must be logical and rational." *Id.* (quoting
 19 *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

20 The Administrative Procedure Act, 5 U.S.C § 551 *et seq.*, provides the
 21 judicial authority to review executive agency action for procedural correctness.
 22 *F.C.C v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). The APA
 23 requires a court to "hold unlawful and set aside agency action, findings, and
 24 conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or
 25 otherwise not in accordance with law; (B) contrary to constitutional right, power,
 26 privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or
 27 limitations, or short of statutory right; or (D) without observance of procedure
 28 required by law." 5 U.S.C. § 706(2).

1 Final agency actions are arbitrary and capricious if the agency fails to
 2 “examine relevant data,” “consider an important aspect of the problem,” or
 3 “articulate a satisfactory explanation for its action including a rational connection
 4 between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State*
 5 *Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This Court’s review of an
 6 agency decision “is based on the administrative record and the basis for the
 7 agency’s decision must come from the record.” *Gill v. U.S. Dep’t of Justice*, 913
 8 F.3d 1179, 1187 (9th Cir. 2019) (quotation omitted). Such review is narrow; the
 9 Court may not substitute its own judgment for that of the agency. *Fox*, 556 U.S. at
 10 513.

11 Not every violation of the APA invalidates an agency action. *Organized Vill.*
 12 *of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (citing *Jicarilla*
 13 *Apache Nation v. U.S. Dep’t of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010)).
 14 Rather, the opponent of the action has the burden to demonstrate that an error is
 15 prejudicial. *Id.* The required demonstration of prejudice is not particularly onerous.
 16 *Id.* “If prejudice is obvious to the court, the party challenging agency action need
 17 not demonstrate anything further.” *Id.* (quoting *Jicarilla*, 613 F.3d at 1121).

18 **a. Whether the Court has jurisdiction over this claim**

19 Defendants argue that the Court lacks jurisdiction over Plaintiff’s APA
 20 claim on two grounds: (1) because Plaintiffs have not plausibly alleged that the
 21 panel agent is an agent of Defendants, any action on the part of the physician
 22 cannot be attributed to Defendants; and (2) even if Plaintiffs have plausibly alleged
 23 that the physician is an agent, they have not plausibly alleged that his failure to
 24 consider whether a vaccine is routinely available constitutes final agency action.

25 Plaintiffs in response first argue that there is a genuine dispute of material
 26 fact regarding whether the physician was an agent of Defendants and thus
 27 resolving the issue on a motion to dismiss is inappropriate. Second, Plaintiffs argue
 28 that the physician’s failure to consider does count as final agency action because

1 the failure to consider was the foundation for the agency's ultimate decision to
2 deny Mr. Hernandez Castro's visa.

i. *Whether Plaintiffs have plausibly alleged that the panel physician was an agent of Defendants*

The APA defines “agency action” broadly to “includ[e] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13); *see also id.* § 701(b)(2). This definition “is meant to cover comprehensively every manner in which an agency may exercise its power.” *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 478 (2001) (citing *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238 n.7 (1980)). Agency action can include actions taken at an agency’s direction and/or by agents of the agency. *See San Francisco Herring Ass’n v. Dep’t of the Interior*, 946 F.3d 564, 576 (9th Cir. 2019) (citing *Indep. Broker-Dealers’ Trade Ass’n v. SEC*, 442 F.2d 132, 137 (D.C. Cir. 1971)).

15 There is a genuine dispute of material fact regarding whether the panel
16 physician was an agent of Defendants. At this stage in the proceedings, there is no
17 evidence in the record to support how Defendants select and rely on panel
18 physicians and to what degree the physician is independent from the agency and
19 vice versa. However, because visa applicants are required to undergo a medical
20 examination with a physician specifically designated by the consulate, this is
21 sufficient to create a plausible allegation that a panel physician is an agent of
22 Defendants. Thus, resolution of this issue on a motion to dismiss is inappropriate.

ii. *Whether Plaintiffs have plausibly alleged that the panel physician's failure to consider routine vaccine availability constituted final agency action*

26 The Supreme Court has set forth “two conditions that generally must be
27 satisfied for agency action to be ‘final’ under the APA”: “[f]irst, the action must
28 mark the consummation of the agency’s decision-making process—it must not be

1 of a merely tentative or interlocutory nature. And second, the action must be one
2 by which rights or obligations have been determined, or from which legal
3 consequences will flow.”” *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S.
4 590, 597 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 17778 (1997)).

5 First, Defendants argue that the panel physician’s alleged failure to consider
6 if the COVID-19 vaccine was routinely available was not a “decision” and thus
7 cannot constitute final agency action. Second, Defendants argue that the panel
8 physician’s failure to recommend a blanket waiver for Mr. Hernandez Castro also
9 does not constitute final agency action because this did not “mark the
10 consummation” of the agency’s decision-making process.

11 Plaintiff in response argues that the panel physician’s failures to act do
12 qualify as final agency action because Defendants relied on his examination and
13 recommendation when making the ultimate decision whether to issue a visa to Mr.
14 Hernandez Castro.

15 There are disputes of material fact that preclude resolution of this issue on a
16 motion to dismiss. There is no evidence in the record regarding how the consulate
17 considers the panel physician’s report/findings when making the final visa
18 decision. For example, it could be that the consulate official merely factors in the
19 panel physician’s report, but undergoes his/her own independent consideration as
20 to whether the applicant meets the visa criteria. But it could also be that the panel
21 physician is the only one who considers the applicant’s medical eligibility for a
22 visa and the consulate official rubber stamps the physician’s finding that the
23 applicant does not meet the vaccination requirements. Without more insight as to
24 how the ultimate visa decision is made and construing the pleadings in the light
25 most favorable to Plaintiffs, the Court concludes that Plaintiffs have plausibly
26 alleged that the panel physician’s failure to consider constituted final agency
27 action. Thus, Plaintiffs have alleged sufficient facts to support that the Court has
28 jurisdiction over their APA claim.

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1 **b. Whether the Court is precluded from judicial review**

2 i. *INA's statutory scheme*

3 The APA confers a general cause of action upon persons "adversely affected
4 or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C.
5 § 702, but withdraws that cause of action to the extent the relevant statute
6 "preclude[s] judicial review," 5 U.S.C. § 701(a)(1). Whether and to what extent a
7 particular statute precludes judicial review is determined not only from its express
8 language, but also from the structure of the statutory scheme, its objectives, its
9 legislative history, and the nature of the administrative action involved. *Block v.*
10 *Cmtv. Nutrition Inst.*, 467 U.S. 340, 345 (1984). When determining whether APA
11 judicial review is precluded, the Court must examine the statutory scheme to figure
12 out (1) if Congress precluded all judicial review; and (2) if not, whether Congress
13 still foreclosed judicial review to the particular class to which the plaintiffs belong.
14 *Id.* at 34546.

15 Some of the arguments in Defendants' motion regarding why the INA
16 precludes judicial review address why consulate officers' visa denial decisions are
17 unreviewable. However, because Plaintiffs have agreed that their claims
18 challenging Mr. Hernandez Castro's ultimate visa denial are unreviewable, the
19 only question for the Court is whether the panel physician's failure to consider
20 COVID-19 vaccine availability and/or to recommend a waiver for Mr. Hernandez
21 Castro is reviewable given the INA's statutory scheme.

22 Defendants argue that the panel physician's failure to recommend a waiver
23 is still unreviewable under the APA because § 701(a)(2) precludes judicial review
24 if the "action is committed to agency discretion by law." Here, 8 U.S.C.
25 § 1182(g)(2)(b) states that the Attorney General "may waive the application of" the
26 vaccination requirement if a panel physician deems that vaccination "would not be
27 medically appropriate." Thus, Defendants argue that the use of the word "may"

1 suggests that the decision to waive the vaccination requirement is solely committed
 2 to the Attorney General's discretion and thus is unreviewable under the APA.

3 Plaintiffs in response argue that, even though the decision whether to waive
 4 the vaccination requirement is solely committed to agency discretion, they are still
 5 allowed to challenge the arbitrary and capricious process that led up to the
 6 decision—specifically, the fact that the panel physician failed to consider the
 7 routine availability of the COVID-19 vaccination in Mexico before making his
 8 recommendation to the consulate official. Plaintiffs argue that the panel
 9 physician's duty to consider this factor was nondiscretionary and therefore
 10 Plaintiffs are allowed to challenge the panel physician's failure to follow the
 11 proscribed process under the APA.

12 The Court was unable to find any caselaw addressing the particular question
 13 of whether a physician's failure to consider a factor affecting a noncitizen's
 14 potential medical ineligibility is reviewable under the APA. *See, e.g., Dominguez*
15 v. United States Dep't of State, No. CV 19-5327 PSG (SSX), 2020 WL 5026878, at
 16 *6 (C.D. Cal. May 22, 2020) (simply holding that “the APA does not provide an
 17 avenue for judicial review of a consular officer’s adjudication of a visa on the
 18 merits, even if based on legal error,” but not addressing whether a noncitizen can
 19 challenge the process leading up to the visa adjudication).

20 However, there is caselaw from other immigration contexts that the Court
 21 finds persuasive which distinguishes between challenging the merits of a
 22 discretionary immigration decision and challenging the nondiscretionary process
 23 leading up to that decision. For example, in *Drammeh v. Clark*, No. C20-0045-
 24 RAJ-MAT, 2020 WL 5122445, (W.D. Wash. July 21, 2020), *report and*
25 recommendation adopted, No. 2:20-CV-00045-RAJ, 2020 WL 5111252 (W.D.
 26 Wash. Aug. 31, 2020), the plaintiffs (also a married couple) brought APA claims
 27 related to the denial of an asylee relative petition. Specifically, the plaintiffs
 28 challenged USCIS's denial of the wife's Form I-730 Refugee/Asylee Relative

1 Petition, requesting that her husband be able to join her the spouse of an asylee.
 2 USCIS stated that its denial was because (1) the wife failed to show that her
 3 marriage was valid; and (2) the wife failed to prove her husband's identity because
 4 USCIS alleged that her husband had previously filed immigration applications
 5 using different birth dates, different countries of origins, and counterfeit
 6 documents. USCIS's denial of the petition was not appealable.

7 The government in that case opposed the plaintiffs' APA claims, arguing
 8 that the District Court for the Western District of Washington lacked jurisdiction to
 9 hear the plaintiffs' APA challenges because the immigration removal statute
 10 precluded judicial review. The district court agreed that it lacked jurisdiction under
 11 the APA to review the ultimate decision to deny a Form I-730 Petition because
 12 such a decision was committed to agency discretion. *Id.* at * 10. However, the
 13 district court noted that the decision whether to grant or deny a Form I-730 petition
 14 is essentially a two-part decision: (1) first, the USCIS must make an eligibility
 15 determination regarding whether the person seeking derivative asylee status is the
 16 principal's spouse or child; and only then (2) decide whether derivative asylee
 17 status should be granted.

18 The district court thus found that the plaintiffs were not challenging the
 19 second step in the process (*i.e.*, the agency's decision to deny the Form I-730
 20 Petition). Instead, the plaintiffs were challenging the *first* step in the process:
 21 USCIS's determination that the husband was ineligible for derivative asylee status,
 22 which the district court found was not a discretionary determination. Thus, the
 23 district court allowed the plaintiffs to proceed with their APA challenge. *Id.* at
 24 *1011. ("With respect to the eligibility requirement—that the person seeking
 25 derivative asylee status be the principal's spouse or child—the statute does not
 26 state that this determination is discretionary. Thus . . . the Court concludes that
 27 § 1252(a)(2)(B)(ii) does not strip it of jurisdiction to review USCIS's eligibility
 28 decision, but the statute does preclude the ultimate discretionary decision

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1 Accordingly, the Court deems it appropriate to review USCIS's eligibility analysis
 2 under the APA."). In support of its decision, the district court cited the Ninth
 3 Circuit's decisions in *Singh v. Holder*, 591 F.3d 1190 (9th Cir. 2010) and *Gutierrez*
 4 *v. Holder*, 662 F.3d 1083 (9th Cir. 2011), which similarly distinguished between
 5 the agency's determination of a noncitizen's eligibility for a certain kind of relief
 6 (nondiscretionary) and the agency's decision to ultimately grant that relief
 7 (discretionary).

8 Here, the Court similarly concludes that 8 U.S.C. § 1182(a)(1)(A)(ii),
 9 (g)(2)(B) does not preclude APA review of the agency's determination of a
 10 noncitizen's medical ineligibility for a visa—specifically, the panel physician's
 11 determination that a vaccination waiver for Mr. Hernandez Castro was not
 12 warranted, even though the panel physician did not consider whether the COVID-
 13 19 vaccine was routinely available. The CDC guidelines regarding the COVID-19
 14 vaccination requirement for noncitizens applying for visas specifically state that
 15 “[p]anel physicians *must* be aware of local availability of and eligibility criteria for
 16 COVID-19 vaccines so they can determine if their applicants are eligible for a
 17 waiver. As with all vaccinations, there are specific blanket waivers that cover
 18 reasons why an applicant did not receive the required vaccination.”² Thus, because
 19 there is nothing in this guidance to suggest that a panel physician has discretion
 20 over the decision to consider whether a noncitizen visa applicant is eligible for a
 21 vaccination waiver, Plaintiffs' APA claim is not barred by the INA's statutory
 22 scheme.

23 //

24

25 ² U.S. Centers for Disease Control, *CDC Requirements for Immigrant Medical*
 26 *Examinations: COVID-19 Technical Instructions for Panel Physicians* (Oct. 4,
 27 2021), <https://www.cdc.gov/immigrantrefugeehealth/panel-physicians/covid-19-technical-instructions.html> (emphasis added).

1 ii. *Doctrine of consular nonreviewability*

2 The parties' arguments regarding the doctrine of consular nonreviewability
 3 are substantially similar to their arguments regarding statutory preclusion of APA
 4 review. Defendants argue that the doctrine of consular nonreviewability precludes
 5 Plaintiffs from challenging the visa denial decision, including the process leading
 6 up to the denial. Conversely, Plaintiffs argue that they are allowed to challenge
 7 Defendants' failure to follow their own rules and processes, even though they are
 8 not allowed to challenge the merits of the ultimate visa denial.

9 The doctrine of consular nonreviewability holds that "a consular official's
 10 decision to issue or withhold a visa is not subject either to administrative or
 11 judicial review." *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir.
 12 1986); *Ventura-Escamilla v. INS*, 647 F.2d 28, 30 (9th Cir. 1981); *Saavedra Bruno*
 13 *v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). The doctrine is rooted in
 14 Congress' plenary power over immigration: the "power to exclude aliens is
 15 'inherent in sovereignty, necessary for maintaining normal international relations
 16 and defending the country against foreign encroachments and dangers—a power to
 17 be exercised exclusively by the political branches of government.' See *Kleindienst*
 18 *v. Mandel*, 408 U.S. 753, 765 (1972); see also *Allen v. Milas*, 896 F.3d 1094, 1105
 19 (9th Cir. 2018).

20 However, the Ninth Circuit has recognized an exception to the doctrine of
 21 consular nonreviewability. In *Patel v. Reno*, the Ninth Circuit held that "when [a]
 22 suit challenges the authority of the consul to take or fail to take an action as
 23 opposed to a decision within the consul's discretion," the doctrine does not stand in
 24 the way of a federal court exercising jurisdiction. 134 F.3d 929, 932 (9th Cir.
 25 1997). In other words, *Patel* states that, if the underlying challenge is that a
 26 consulate officer acts or fails to act regarding one of their *nondiscretionary* duties,
 27 the doctrine of consular nonreviewability does not bar judicial review. *See Davila*
 28 *v. Holder*, No. C-09-5058 JCS, 2010 WL 1264670, at *4–5 (N.D. Cal. Mar. 30,

1 2010) (citing *Nwansi v. Rice*, No. C 06-0003 TEH, 2006 WL 2032578, at *3 (N.D.
 2 Cal. July 18, 2006)).

3 Courts have interpreted and applied the *Patel* exception differently. For
 4 example, in *Davila v. Holder*, the District Court for the Northern District of
 5 California found that the doctrine of consular nonreviewability did *not* bar the
 6 plaintiff's challenge to the consulate's failure to accept a noncitizen's motion to
 7 reconsider its decision denying his visa. 2010 WL 1264670 at * 5. Specifically, the
 8 district court concluded that, because 22 C.F.R. § 42.81(e) is phrased using
 9 mandatory "shall" language, the consulate's duty to reconsider the plaintiff's visa
 10 denial was nondiscretionary. *Id.*

11 Conversely, in *Shiu Ying Wong Woo v. Leavitt*, the District Court for the
 12 Eastern District of California found that the doctrine of consular nonreviewability
 13 *did* bar the plaintiff's lawsuit challenging (1) the consulate's decision to deny his
 14 visa application solely based on his admission to experimental drug use, rather than
 15 based on any evidence of his prosecution or conviction for violating controlled
 16 substances laws; (2) the panel physician improperly reporting that the plaintiff's
 17 past drug use was a "Class A" or "Class B" medical condition, which thus made
 18 the plaintiff inadmissible to the United States; (3) the consulate's decision to
 19 delegate its authority to the panel physician to independently review and adjudicate
 20 the plaintiff's visa application; and (4) the consulate's decision to deny the plaintiff
 21 an opportunity to challenge the inadmissibility finding through administrative
 22 review. No. 2:07-CV-2019-GEB-GGH, 2008 WL 2774448, at *1 (E.D. Cal. June
 23 27, 2008). The district court dismissed all of the plaintiff's claims, stating that all
 24 of his challenges still amounted to challenges of the ultimate decision to deny his
 25 visa, which is impermissible. The district court also distinguished *Patel v. Reno* by
 26 stating that *Patel* involved a challenge to the consulate's refusal to make a decision
 27 regarding a pending visa application, whereas in this case, the consulate had
 28 already made a decision—specifically, a decision to deny the plaintiff's visa.

1 Defendants in this case rely on one case in particular: *Capistrano v. Dep’t of*
 2 *State*, 267 F. App’x 593 (9th Cir. 2008), an unpublished Ninth Circuit case.
 3 Defendants place great emphasis on this language in particular regarding the
 4 doctrine of nonreviewability: “[t]hat the Appellants characterize their complaint as
 5 one challenging the process followed by the consulate rather than its ultimate
 6 decision does not exempt the case from this well-settled doctrine. *See Loza–*
 7 *Bedoya v. Immigration and Naturalization Service*, 410 F.2d 343, 347 (9th
 8 Cir.1969). At its core, the relief sought by the Appellants would require the Manila
 9 consulate to revisit its decision denying the visa applications. Issuing such relief
 10 would be exactly what the doctrine of consular nonreviewability prevents us from
 11 doing.” *Id.* at 59495.

12 Here, Plaintiffs’ challenge is not barred by the doctrine of consular
 13 nonreviewability. First, a panel physician’s duty to consider whether a noncitizen
 14 visa applicant qualifies for a vaccine waiver is a nondiscretionary duty, which puts
 15 Plaintiffs’ challenge within the boundaries of the *Patel* exception (*i.e.*, because
 16 they are challenging the panel physician’s failure to take an action that was not
 17 within his discretion).

18 Additionally, unlike in *Wong* where the plaintiff was challenging the panel
 19 physician’s action, Plaintiffs are challenging the panel physician’s *inaction*, which
 20 makes it more akin to *Patel* and *Davila*. *See Davila*, 2010 WL 1264670 at *6 (In
 21 *Wong . . . the court was not presented with the question of whether a consular*
 22 *officer had failed to perform a duty that it was required by federal law to*
 23 *perform.”*).

24 Finally, the agency action that the plaintiffs were challenging in *Capistrano*
 25 was the consulate’s choice to defer to medical providers’ determinations of drug
 26 abuse and addiction, even though—under the relevant federal regulations—the
 27 plaintiffs’ drug use would not have been classified as abuse or addiction.
 28 *Capistrano et al. v. U.S. Dep’t of State*, No. 05-CV-6408-PA, ECF No. 24 (May

1 26, 2006). The District Court for the Central District of California dismissed the
 2 plaintiffs' claims based on the doctrine of consular nonreviewability because, it
 3 reasoned, "the relief Plaintiffs seek would require the Court to review the denials
 4 of the immigrant visas by the consular officials." *Id.* at 3.

5 However, the present case does not raise the same concerns as were present
 6 in *Capistrano*. Here, Plaintiffs are simply requesting that Defendants follow their
 7 own processes when considering visa applications. Also unlike in *Capistrano* and
 8 *Wong*, the Court's decision to grant relief in this case would not necessarily have
 9 an effect on the ultimate visa decision—even if the Court compelled the panel
 10 physician to consider the routine availability of the COVID-19 vaccine,
 11 Defendants could still decide to deny Mr. Hernandez Castro's visa application (*i.e.*,
 12 find that the COVID-19 vaccine was routinely available at the time and that Mr.
 13 Hernandez Castro did not qualify for a blanket waiver).

14 Thus, because neither statutory preclusion nor the doctrine of consulate
 15 nonreviewability bars Plaintiffs' APA challenge, the Court denies Defendants'
 16 motion to dismiss Plaintiffs' APA claim.

17 2. Plaintiffs' procedural due process claim

18 Ms. Hernandez argues that Defendants violated procedural due process
 19 because she has a right to constitutionally adequate procedures in the adjudication
 20 of her husband's visa application. Defendants argue that this claim fails for two
 21 reasons: (1) because it too is barred by the doctrine of consular nonreviewability;
 22 and (2) because, under Supreme Court and Ninth Circuit caselaw, the agency is
 23 only required to provide the U.S. citizen spouse a "facially legitimate and bona fide
 24 reason" for the denial of the noncitizen spouse's visa in order to protect procedural
 25 due process.

26 //

27 //

28 //

1 **a. Whether this claim is barred under the doctrine of consular
2 nonreviewability**

3 For the same reasons articulated in the APA section, the Court finds that the
4 doctrine of consular nonreviewability does not bar Plaintiffs' due process
5 challenge. Because Plaintiffs are challenging the agency's failure to perform a
6 nondiscretionary duty, this falls under the *Patel* exception to the doctrine. *Contra*
7 *Benjamin v. United States Dep't of State*, No. 17-CV-03587-LB, 2018 WL
8 1142124, at *4 (N.D. Cal. Mar. 2, 2018) (finding that the doctrine of consular
9 nonreviewability barred a due process violation claim).

10 **b. Whether Defendants provided a facially legitimate and
11 bona fide reason**

12 Defendants argue that Ms. Hernandez Castro's procedural due process claim
13 fails because Defendants provided her with a facially legitimate and bona fide
14 reason for her husband's visa denial—namely, that he had failed to receive the
15 COVID-19 vaccination as required by statute. Plaintiffs in response argue that
16 there is a genuine dispute of material fact regarding whether the reason for the
17 denial was bona fide, given the panel physician's failure to consider routine
18 availability of the COVID-19 vaccine.

19 The Ninth Circuit in *Bustamante v. Mukasey* held that, though a consular
20 official's decision to grant or deny a visa is generally not subject to judicial review,
21 there is a limited exception "where the denial of a visa implicates the constitutional
22 rights of American citizens." 531 F.3d 1059, 1061 (9th Cir. 2008) (citing *Mandel*,
23 408 U.S. 753). Under *Bustamante* and *Mandel*, "a U.S. citizen raising a
24 constitutional challenge to the denial of a visa is entitled to a limited judicial
25 inquiry regarding the reason for the decision. As long as the reason given is
26 facially legitimate and bona fide the decision will not be disturbed." *Id.* at 1062.

27 For example, in *Bustamante*, Alma Bustamante, the wife, asserted a
28 procedural due process challenge to the denial of her husband Jose's visa

1 application. Ms. Bustamante was told that her husband's visa application was
 2 denied because the consulate "had reason to believe" that Jose was a controlled
 3 substance trafficker. However, Ms. Bustamante argued that that the consulate
 4 officer was operating on a mistaken belief and requested that the Ninth Circuit
 5 remand to the district court for further factual development, specifically to require
 6 the defendants to present specific evidence to substantiate that Jose was a drug
 7 trafficker.

8 The Ninth Circuit rejected Ms. Bustamante's claim. Pursuant to the *Mandel*
 9 inquiry, the Ninth Circuit first found that the agency provided her a "plainly []"
 10 "facially legitimate reason" for her husband's denial—specifically that being a
 11 controlled substance trafficker is a statutory basis for inadmissibility under 8
 12 U.S.C. § 1182(a)(2)(C). *Id.* Second, the Ninth Circuit found that Ms. Bustamante
 13 had failed to allege sufficient bad faith to create a genuine dispute of material fact
 14 regarding whether the reason was bona fide. Although it acknowledged the
 15 Bustamantes' allegation that Jose was not and had never been a drug trafficker, the
 16 Ninth Circuit stated that the Bustamantes (1) failed to allege that the consular
 17 official did not in good faith believe the information he had regarding Jose's drug
 18 trafficking; and (2) even though the consulate offered to make an informant deal
 19 with Jose on the basis of its belief that he was a drug trafficker, the Bustamantes
 20 failed to allege that this was illegal or improper. *Id.* at 1062-63. Thus, the Ninth
 21 Circuit concluded that Ms. Bustamante had failed to state a valid procedural due
 22 process claim.

23 Like in *Bustamante*, it is indisputable that Mr. Hernandez Castro's failure to
 24 obtain the COVID-19 vaccination as required under the statute was a statutory
 25 basis for inadmissibility and thus was a facially legitimate reason for the denial.
 26 However, Plaintiffs have plausibly alleged that this reason was not bona fide given
 27 that the panel physician failed to consider a key factor that may have affected this
 28 ground of inadmissibility—namely, whether the COVID-19 vaccination was

1 routinely available to Mr. Hernandez Castro. Thus, the Court denies Defendants'
 2 motion to dismiss Plaintiffs' procedural due process claim.

3 3. Plaintiffs' mandamus claim

4 Plaintiffs argue that they are entitled to mandamus relief. Specifically,
 5 Plaintiffs request an order from the Court requiring (1) Defendants to reconsider
 6 the initial decision to deny Mr. Hernandez Castro's visa application pursuant to 8
 7 C.F.R. § 42.81(e); and (2) if, upon reconsideration, the consulate no longer finds
 8 that Mr. Hernandez Castro is inadmissible, to require Defendants to consider his
 9 previous Form I-601A waiver valid and not revoked. Defendants argue that
 10 Plaintiffs' claim for mandamus relief fails for two reasons: (1) Plaintiffs have not
 11 established that they are "clearly and indisputably" entitled to the relief they seek,
 12 especially because the actions they request are not nondiscretionary, ministerial
 13 acts; and (2) Plaintiffs have alternative means to obtain the relief they seek, which
 14 defeats their mandamus claim.

15 Plaintiffs in response first argue that Defendants' duty to reconsider Mr.
 16 Hernandez Castro's visa denial, given that there is now additional evidence
 17 overcoming his original ground of inadmissibility, is mandatory and thus is
 18 appropriate for a mandamus claim. Second, Plaintiffs argue, if reconsideration is
 19 granted and the visa denial is reversed, it would logically follow that Mr.
 20 Hernandez Castro's Form I-601A waiver would be reinstated, given that he would
 21 no longer have any other grounds of inadmissibility. Finally, Plaintiffs argue that
 22 there is a genuine dispute of material fact regarding whether forcing Mr.
 23 Hernandez Castro to apply for a new Form I-601A waiver constitutes adequate
 24 relief.

25 The Mandamus Act states: "The district courts shall have original
 26 jurisdiction of any action in the nature of mandamus to compel an officer or
 27 employee of the United States or any agency thereof to perform a duty owed to the
 28 plaintiff." 28 U.S.C. § 1361. Mandamus is considered to be an extraordinary

1 remedy. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir.1994) (citing *Stang v.*
 2 *IRS*, 788 F.2d 564, 565 (9th Cir. 1986)). A district court may issue a writ of
 3 mandamus under § 1361 “only when (1) the plaintiff’s claim is ‘clear and certain’;
 4 (2) the defendant official’s duty to act is ministerial, and ‘so plainly prescribed as
 5 to be free from doubt’; and (3) no other adequate remedy is available.” *Barron*, 13
 6 F.3d at 1374. As a general rule, “mandamus may not be used to impinge upon an
 7 official’s legitimate use of discretion.” *Id.* at 1376. The only exception exists when
 8 “statutory or regulatory standards delimiting the scope or manner in which such
 9 discretion can be exercised . . . have been ignored or violated.” *Id.*

10 There are genuine disputes of material fact regarding whether Plaintiffs can
 11 receive mandamus relief regarding their request for reconsideration of Mr.
 12 Hernandez Castro’s visa denial. Specifically, there are unanswered questions
 13 regarding (1) whether reinstatement of the Form I-601A waiver is available as
 14 mandamus relief or whether the only avenue to receive this waiver is through
 15 reapplication; and (2) whether requiring Mr. Hernandez Castro to reapply for a
 16 Form I-601A waiver is an adequate alternative means of relief, especially if there
 17 are any timeline concerns with the one-year window in which Plaintiffs have to
 18 request reconsideration.³ Thus, the Court denies Defendants’ motion to dismiss
 19 Plaintiffs’ mandamus claim.

20 _____
 21 ³ There is also a dispute of material fact regarding whether Plaintiffs have formally
 22 requested reconsideration. 8 C.F.R. § 42.81(e) suggests that a request for
 23 reconsideration is made if the noncitizen provides the consulate evidence that
 24 would overcome his previous ground of inadmissibility—which Mr. Hernandez
 25 Castro did here when he provided his proof of COVID-19 vaccination. However, it
 26 is unclear to the Court whether there any other procedural requirements that
 27 Plaintiffs have to satisfy in order to initiate the reconsideration process. It is also
 28 unclear to the Court whether Defendants are already reviewing the request for

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendants' Motion to Dismiss the Amended Complaint, ECF No. 6,
3 is **DENIED.**

4 2. The Court shall set a scheduling conference with the parties by
5 separate notice to discuss setting a trial date.

6 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to file
7 this Order and provide copies to counsel.

8 **DATED** this 11th day of April 2022.



11 A handwritten signature in blue ink that reads "Stanley A. Bastian".
12

13 Stanley A. Bastian
14 Chief United States District Judge
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27 reconsideration or if they are refusing to consider the request, given Mr. Hernandez
28 Castro's lack of a valid Form I-601A waiver.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS # 24